No. 95-1441

Supreme Court, U.S.
FILED
OCT 17 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LINDA J. BLESSING,

Petitioner,

—v.—

CATHY FREESTONE, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ARIZONA CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Arizona Civil Liberties Union is one of its statewide affiliates. This case raises issues of special importance to the ACLU because petitioner has called into question both *Maine v. Thiboutot*, 448 U.S. 1 (1980), and *Ex Parte Young*, 209 U.S. 123 (1908), two of the principal vehicles for civil rights litigation in this country. We urge the Court to affirm the decision below, and to reject petitioner's view that state officials cannot be held accountable in federal court for violating federal law.

STATEMENT OF THE CASE

This action for declaratory and injunctive relief was brought on behalf of custodial parents and their children. It challenges the failure of Arizona officials to comply with the mandates of Title IV-D of the Social Security Act, 42 U.S.C. §§651-69. Pursuant to Title IV-D, the federal government provides Arizona with funding for child support programs. In return, Arizona is obligated to provide certain child support services designed, *inter alia*, to recover child support payments from delinquent parents. As described by the lower court, the federally mandated services include a system for the "establishment of paternity, enforcement of support orders, and parent locator services." *Freestone v. Cowan*, 68 F.3d 1141, 1143 (9th Cir. 1995).

The complaint filed by respondents in this case alleges that Arizona officials were not in fact providing the services

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

that federal law requires. Specifically, the complaint sets forth the individual stories of several mothers who, despite repeated attempts, could not obtain the mandated Title IV-D services from Arizona officials. It also recites statistics to show that the particular problems identified in the complaint are serious and widespread.

Petitioner moved to dismiss on the grounds that the parents and children who initiated this suit have no private right of action to enforce the federal mandates. The district court agreed with petitioner, treating it as a motion for summary judgment. The court of appeals reversed, holding that Congress did not intend to foreclose private enforcement of Title IV-D.

In this Court, petitioner presses three arguments: (1) there is no private right of action under the traditional standards for resolving that issue, most recently articulated in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and *Suter v. Artist M.*, 503 U.S. 347 (1992); (2) this Court should reverse or sharply limit the holding in *Maine v. Thiboutot*, 448 U.S. 1, that 42 U.S.C. §1983 provides a - private right of action to enforce federal statutory rights as well as federal constitutional guarantees; and (3) this Court should reverse or sharply limit the holding in *Ex Parte Young*, 209 U.S. 123, that the Eleventh Amendment does not prohibit federal courts from requiring state officials to comply with federal law.

Amici agree with respondents that a private right of action exists to enforce Title IV-D under the standards of *Wilder* and *Suter*. However, this brief focuses on petitioner's challenge to *Maine v. Thiboutot* and *Ex Parte Young*. If successful, that challenge would dramatically alter legal structure established by this Court over the last century to enforce rights created by federal law.

SUMMARY OF ARGUMENT

Although the word "federalism" does not appear in the Constitution, there is no doubt that it is crucial to the American constitutional system. Federalism refers to the division of powers between the national and the state governments. Under our constitutional system, each has its own sphere of authority and responsibility. Properly understood, therefore, federalism is as much about preserving the power and responsibility of the federal government as it is about preserving the power and responsibility of the states.

Petitioner emphasizes one aspect of federalism: safeguarding state governments from federal encroachments. The Tenth Amendment's limits on Congress and the Eleventh Amendment's restrictions on the federal judicial power reflect this constitutional concern. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. __, 116 S.Ct. 1114 (1996); *New York v. United States*, 505 U.S. 144 (1992).

Petitioner, however, ignores the other aspect of federalism: protecting the interests of the national government. The single most important constitutional provision concerning federalism is found in Article VI: "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." In short, federalism is also, in major part, about ensuring the supremacy of federal law. *Sterling v. Constantin*, 287 U.S. 378, 397 (1932); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. __, __, 115 S.Ct. 1842, 1872 (1995)(Kennedy, J., concurring)(emphasizing that federalism is about protecting both state sovereignty and the interests of the national government).

There is no doubt that §1983 was meant to empower the federal courts to review state and local actions to ensure their compliance with federal law. During the debates pre-

ceding enactment of §1983, one Congressman and Senator after another so declared. Cong. Globe, 42d Cong., 1st Sess. 321 (1871)(remarks of Rep. Stoughton); *see also id.* at 374-76 (remarks of Rep. Lowe); *id.* at 459 (remarks of Rep. Coburn); *id.* at 609 (remarks of Sen. Pool); *id.* at 687 (remarks of Sen. Surz); *id.* at 691 (remarks of Sen. Edmunds). Likewise, this Court has often recognized the critical importance of federal court review in assuring state compliance with the Constitution and laws of the United States. *See, e.g., Mitchum v. Foster*, 407 U.S. 225 (1972).

Contrary to petitioner's argument in this case, *Ex Parte Young* and *Maine v. Thiboutot* are not at war with federalism, they are essential to its preservation. It is through suits against state officers pursuant to *Ex Parte Young* that state compliance with federal law is achieved. As the Court noted in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 105 (1984)(*Pennhurst II*): "Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights." *Id.* at 105. Or, as the Court explained in *Green v. Mansour*, 474 U.S. 64, 68 (1986): "[T]he availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the supremacy clause."

Likewise, it is through *Maine v. Thiboutot* that suits can be brought, pursuant to §1983, to ensure state and local compliance with federal statutes. Thus, after again reviewing the legislative history of §1983 in *Maine v. Thiboutot*, the Court concluded that "there can be no doubt that [§1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 448 U.S. at 5, quoting *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 700-701 (1978).

Petitioner's brief is breathtaking in its willingness to disregard this Court's well-established jurisprudence and impose new restrictions on federal court jurisdiction. For all practical purposes, petitioner seeks to overrule *Ex Parte Young* by contending that the Eleventh Amendment bars all suits, including suits for injunctive and declaratory relief, where it is the state that is the real party in interest. Pet.Br. at 25. In *Young* itself, the State of Minnesota was the real party in interest: the injunction against Edward Young was to prevent the enforcement of a state statute. Indeed, in virtually every case, suits pursuant to *Ex Parte Young* are brought to enjoin enforcement of a state law or policy; ultimately, the state is the real party in interest in all these cases. In addition, petitioner expressly calls for this Court to overrule its decision in *Maine v. Thiboutot*, 448 U.S. 1. Pet.Br. at 30-48.

The radical changes urged by petitioner would dramatically upset the allocation of power between the national and state governments by allowing states to violate federal law with impunity. Instead of promoting federalism, the changes urged by petitioner would do exactly the opposite and would abandon the framers' plan for a national government supreme over the states.

ARGUMENT

I. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO REVERSE OR SHARPLY LIMIT THE HOLDING OF *MAINE v. THIBOUTOT*

A. *Maine v. Thiboutot* Was Correctly Decided

Petitioner argues that this Court should reverse the holding of *Maine v. Thiboutot* and hold instead that §1983 either provides no private right of action to enforce federal statutory guarantees, or that it provides a private right of action only to enforce constitutional provisions and statutes that provide for the enforcement of "equal or civil rights." Be-

cause *Thiboutot* was correctly decided, petitioner's argument should be rejected.

Section 1983 provides a cause of action for the ". . . deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." In the 1960s, this Court was increasingly presented with suits alleging violations of "laws" independent of or in addition to constitutional violations. By 1979, the Court had decided many such cases, as all Justices then on the Court acknowledged. *See Thiboutot*, 448 U.S. 1, 6, and at 26, 30-33 (Powell, J., dissenting); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 644-46 (1979)(Powell, J., concurring), 660-63 (White, J., concurring); and 673-74 (Stewart, J., dissenting).

In some cases, the Court simply reached the merits without discussing the applicability of §1983. In other cases, the Court supported its holding by noting that §1983 provided a cause of action for violations of federal statutes as well as constitutional provisions. For example, in *Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966), the Court said that state officials could be held liable under §1983 "not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well." In *Edelman v. Jordan*, 415 U.S. 651, 675 (1974), then-Justice Rehnquist, writing for the Court, said that "suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act," citing *Rosado v. Wyman*, 397 U.S. 397 (1970). *See also Quern v. Jordan*, 440 U.S. 332, 337 (1979). In *Owen v. City of Independence*, 445 U.S. 622, 649 (1980), the Court said that the question under §1983 was whether the defendants had conformed to the Constitution "and statutes."

This view was relatively uncontroversial until 1979, when a debate began among the Justices of this Court on the

scope of the "and laws" portion of §1983. Relying primarily on legislative history from the nineteenth century, three Justices in *Chapman*, led by Justice Powell, argued that "and laws" meant "and equal or civil rights laws." 441 U.S. at 623. In response, four Justices argued that the phrase "and laws" contained no such qualifiers. *Id.* at 646, 672.

The debate that surfaced in *Chapman* was settled in *Thiboutot*, only one year later. By a vote of 6-3, the Court held that the phrase "and laws" in §1983 meant exactly what it said and was not limited to "equal or civil rights laws." The *Thiboutot* Court relied upon: (1) the plain language of the Act, (2) its prior decisions, and (3) the legislative history of §1983. Because in each case the Court's view was correct, petitioner's challenge to *Thiboutot* should be rejected.

1. Plain Language Of §1983

First and foremost, the plain language of §1983 contains no limitations. The statute has no modifying phrase that can fairly be read to limit either the constitutional[2] or statutory provisions for which a cause of action is created.

The phrase "Constitution and laws" was hardly unfamiliar to Congress. Its first appearances are in Article III, §2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .") and the Supremacy Clause ("This Constitution and the Laws of the United States, which shall be

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[2] It is not clear whether petitioner would have the Court also limit the constitutional rights that can be enforced pursuant to §1983 and thereby reverse *Monroe v. Pape*, 365 U.S. 167 (1961), and *United States v. Classic*, 313 U.S. 299 (1941). At one point, petitioner appears to suggest precisely that, thus further reinforcing the truly radical scope of petitioner's argument. Pet.Br. at 36 n.19.

made in Pursuance thereof. . . shall be the supreme law of the Land . . . ."), Article VI, cl. 2. Alexander Hamilton used the phrase in THE FEDERALIST PAPERS. Federalist Nos. 78 and 80 (539 J. Cooke ed. 1961). In 1801, Congress enacted a short-lived predecessor to the federal question jurisdictional statute which, like its current version, used the phrase. Act of Feb. 13, 1801, §11, 2 Stat. 89, 92; *repealed by* Act of March 8, 1802, §1, 2 Stat. 132. The phrase also appears in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 391-92 (1821).

Based on this history, it is reasonable to assume that Congress knew what it was doing when it referred, in §1983, to rights secured by the "Constitution and laws" of the United States, and that it used those terms in their ordinary sense. Certainly, that was this Court's conclusion in numerous cases culminating in *Thiboutot*, but not limited to it. Even if the text were less clear, such a consistent interpretation of the congressional language is entitled to respect.[3]

2. Legislative History Of §1983

Section 1983 has its origins in §1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which provided that African-American citizens would have the "same right" as white citizens "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property." Section 3 of that Act gave the federal courts jurisdiction to enforce those rights.

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[3] "[O]ur acceptance of the plain terms of [§1983] and analogous criminal proscriptions has been consistent, and for over a century Congress has not acted to rectify any purported error in our construction of these provisions." *Chapman*, 441 U.S. at 658-59 (White, J. concurring).

In 1871, Congress expanded the Act by creating a private right of action that was not limited to the enumerated rights from the 1866 law; instead, it provided for suit concerning "any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat. 13.[4] In 1874, Congress changed the language again to its current version, which now protects "any rights . . . secured by the Constitution and laws . . ." Rev.Stat. §1979.[5]

Congress also created two jurisdictional statutes in 1874. The district court jurisdictional statute, Rev.Stat. §563(13), was consistent with §1983 and provided jurisdiction for violations of laws as well as the Constitution. The circuit court jurisdictional statute provided jurisdiction only for "any law providing for equal rights." Rev.Stat. §629 (16).[6] In 1911, Congress merged the two jurisdictional statutes into the present §1343(3), providing jurisdiction for any "Act of Congress providing for equal rights . . ." Judicial Code of 1911, ch. 231, §24, 36 Stat. 1087, 1091.

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[4] Section 16 of the 1870 Act, governing criminal penalties, expanded previous law and made it a crime to conspire to deny any right secured by the Constitution "or laws." Ch. 114, 16 Stat. 140; *Chapman*, 441 U.S. at 651 (White, J., concurring). *See also United States v. Price*, 383 U.S. 787 (1966); *United States v. Classic*, 313 U.S. 299. That language, in what is now 18 U.S.C. §§241, 242, has been interpreted consistently with the identical language in §1983. Petitioner does not indicate if she believes a modifier should also be implied in §§241 and 242, thus overruling *Price*, *Classic*, and similar cases, as well as *Thiboutot*. *See Chapman*, 441 U.S. at 662-63 (White, J. concurring).

[5] Because they are identical for purposes of this case, Rev.Stat. §1979 will be referred to by its present designation, §1983.

[6] The criminal statutes continued to prohibit violations of rights under the "Constitution or laws." *Chapman*, 441 U.S. at 661 (White, J. concurring).

Petitioner's argument that the phrase "and laws" in §1983 should be limited to "laws providing for equal rights" rests on two basic premises, both of which were also advocated by Justice Powell in *Chapman* but rejected by the full Court in *Thiboutot*. First, petitioner argues that the revision of the statutes in 1874 was supposed to be technical, not substantive. *Chapman*, 441 U.S. at 625; *Thiboutot*, 448 U.S. at 16-18. Second, petitioner contends that §1983, and its two jurisdictional counterparts, Rev.Stat. §563(13)(district court jurisdiction without limitation) and §629(16)(circuit court jurisdiction limited to "equal rights"),[7] should be interpreted to have the same meaning despite their different language. Furthermore, petitioner argues that the meaning that should be ascribed to all three statutes is the limited one of §629(16) rather than the more expansive one found in the other two statutes and the corresponding criminal statutes. *See also Chapman*, 441 U.S. at 635 (Powell, J.). Both premises of petitioner's argument are flawed.

Specifically, there is ample evidence in the legislative history that Congress recognized it was expanding §1983 when it added the phrase "and laws" in 1874. *Chapman*, 441 U.S. at 664, n.40 (White, J. concurring). Representative Lawrence's comment that §1983 would be applied more broadly than its predecessor in a "few cases," *id.*, both supports the notion that the language change was intentional and reflects the fact that, in 1874, there were only a "few" statutory rights that could be protected by §1983. *See* Rev. Stats. §§2259, 2289, 2319, 2320, 3194, 3199. In addition, Congress rejected a proposal offered by Representative Willard which would have required that any provision of the Revised Statutes be interpreted identically to earlier, differ-

[7] Hereinafter, §§563(13) and 629(16), unless explicitly so cited, will be referred to by the section given them after merger, §1343.

ently worded provisions. 2 Cong.Rec. 648 (1874); *see also Hamilton v. Rathbone*, 175 U.S. 414 (1899); *Vietor v. Arthur*, 104 U.S. 498, 500 (1881); *McDonald v. Hovey*, 110 U.S. 619, 629 (1883); *Deffeback v. Hawke*, 115 U.S. 392, 402 (1885); Endlich, A COMMENTARY ON THE INTERPRETATION OF STATUTES 65 (1888).[8]

Whether one characterizes the 1874 change as "technical" or not, the language of §1983 is clear and unambiguous, especially when compared to the narrower language used by Congress when it defined the jurisdiction of the circuit courts. Significantly, moreover, the first draft of §1983 contained the narrower language of the 1871 Act; it was changed for the final draft. Title LXXIII, Chap. VII, §190 (Draft of 1872). Under analogous circumstances, this Court has repeatedly held that the Revised Statutes of 1874 must be seen as having changed the law where the plain language so dictates. *See United States v. Bowen*, 100 U.S. 508, 513 (1880)("when the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision . . ."); *Hamilton v. Rathbone*, 175 U.S. at 419-21 ("prior acts may be resorted to, to *solve*, but not to *create* an ambiguity")(emphasis in original); *Continental Casualty Co. v. United States*, 314 U.S. 527, 530 (1942).

In addition, after 1874, Congress recognized that it had inadvertently made some 253 substantive errors. Those

[8] The 1874 Revisions explicitly repealed all prior statutes. Rev.Stat. §5596; 2 Cong.Rec. 2713 (1874). *See also* 7 Cong.Rec. 1137 (1878)(in interpreting the Revised Statutes of 1874, "the courts cannot look back to the original and be governed by that, because the original act has been repealed . . .")(Sen. Christiancy). When a later significant revision of federal law was proposed, Congress adopted the opposite approach and refused to "have it absolutely replace all the laws of the United States as was done by the Revised Statutes in 1874." 67 Cong.Rec. 12074 (1926)(Rep. Fitzgerald).

were corrected in 1877 and again in 1878. 18 Stat. 1433-36; 19 Stat. 240 (1877). Section 1983 was not among those corrected, though other provisions of both of the jurisdictional statutes were modified. *See* R. Dwan and E. Feidler, "The Federal Statutes: Their History and Use," 22 Minn.L. Rev. 1008, 1014 (1938); M. Price and H. Bitner, EFFECTIVE LEGAL RESEARCH 29 (3d ed. 1969); Comment, "Section 1983 and the Private Enforcement of Federal Statutes: A New Frontier for the Civil War Legislation," 18 Willamette L.Rev. 433 (1982).

Petitioner's second premise -- that §1983 and §1343 must be read identically -- is equally flawed. There is simply no reason to suggest that §§1983 and 1343(3) need be read identically. *See generally Chapman*, 441 U.S. at 660-63 (White, J., concurring). It is entirely logical, as this Court ultimately held, to assume that Congress chose to limit the availability of §1343 to actions seeking to enforce equal rights laws while providing jurisdiction over other statutory §1983 actions only where the requisite amount in controversy under §1331 was met. Such a choice presumably would have been based either on the theory that suits claiming infringements of the equal rights guarantees are less amenable to pecuniary valuation than other actions, *see Hague v. CIO*, 307 U.S. 496, 529 (1939), or on the theory that suits claiming such violations should be heard regardless of the amount in controversy.[9]

3. Petitioner's Proposed Alternatives To *Thiboutot*

Petitioner suggests two "interpretations" of §1983 to replace the holding in *Thiboutot*. First, she suggests that

[9] Since the 1908 elimination of a jurisdictional amount requirement in federal question cases, this debate is irrelevant. 28 U.S.C. §1331. *See* Pub.L.No. 96-486, §2(a), 94 Stat. 2369 (1980).

§1983 should be read to create a private right of action only where another statute creates a private right of action. Pet. Br. at III.A. This would, of course, make §1983 entirely superfluous.[10] Undeterred, petitioner argues that making §1983 superfluous would be a harmless act because an implied private right of action exists to enforce constitutional rights,[11] and because other statutes would create private rights of action where Congress intended they exist. Whether this Court would be causing harm or not by essentially repealing §1983 is irrelevant. As petitioner admits, the key question is congressional intent and it is elemental that this Court should not lightly presume that Congress intended to pass totally meaningless statutes. Indeed, in light of the history of §1983, for this Court to find that Congress did not intend it to have any meaning would be a most remarkable holding.

Second, petitioner suggests that §1983 be limited to creating a private cause of action to enforce "equal or civil rights." Pet.Br. at III.B. Primarily for the reasons stated above, this argument is unpersuasive. Any lingering doubt was removed when this Court recently reaffirmed its holding in *Thiboutot* rejecting that argument. Specifically, in *Dennis v. Higgins*, 498 U.S. 439 (1991), the Court stated that "[a]

[10] She also suggests the need to adhere to the plain statement rule. Pet. Br. at III.A. Of course, in *Thiboutot*, this Court held that §1983 is a plain statement of Congress' intent.

[11] In support, petitioner cites *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a case establishing a private right of action to sue federal officials, not state officials, for violation of constitutional rights. This Court has never explicitly held that an implied right of action exists to sue state officials for violation of constitutional rights. It has never had to -- §1983 provides that cause of action. It is only by seeking to render §1983 meaningless that petitioner must ask this Court to reach the issue of an implied cause of action.

broad construction of §1983 is compelled by the statutory language, which speaks of deprivations of 'any rights, privileges, or immunities secured by the Constitution and laws.' Accordingly, we have 'repeatedly held that coverage of [§ 1983] must be broadly construed.'" *Id.* at 443. *Dennis* further noted:

> the Court has never restricted the section's scope to the effectuation of [equal rights]. Rather we have given effect to its broad language, recognizing that §1983 "provides a remedy to be broadly construed, against all forms of official violation of federally protected rights. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-701 (1978). Thus we have refused to limit the phrase 'and laws' in §1983 to civil rights or equal protection laws.

Id. at 445; *Livadas v. Bradshaw*, 512 U.S. __, __, 114 S.Ct. 2068, 2083 (1994). To accept petitioner's argument would be to reject the statements in *Dennis*. Alternatively, it would require that the Court hold that there was an implied limitation on the "and laws" portion of §1983 that did not exist in the "Constitution" portion.

Petitioner suggests one other rationale for adopting this interpretation.[12] It would, she argues, "bring[] §1983 into

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[12] Petitioner also emphasizes that §1983 does not create a cause of action unless there is a "right . . . secured." She argues that this somehow requires the plain statement of a cause of action in the underlying substantive statute. Instead, the "right . . . secured" language connotes that the right is mandatory. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)(*Pennhurst I*). No section of the Constitution has an express right of action, yet many sections have been held by the Court to "secure" rights that are enforceable through §1983. *See Chap-*
(continued...)

harmony with the Court's most recent interpretation of the Eleventh Amendment." Pet.Br. at 43. Of course, §1983 does not abrogate the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. at 341. Thus, restricting §1983 is not necessary to protect the values of the Eleventh Amendment. Instead, this argument is really a thinly disguised second attempt to limit or reverse *Ex Parte Young* and, for the reasons stated in Point II of this brief, should be rejected.

B. The Standards Required For Violating The Principles Of *Stare Decisis* Have Not Been Met

"The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), quoting *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). It has also said that "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 ("'the evenhanded predictable, and consistent development of legal principles . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process' counsel strongly against reconsideration of our precedent." *See also Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

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[12] (...continued)
man, 441 U.S. at 613 n.29 (referring to rights "protected by the Constitution and hence secured by it")(citations omitted). Thus, to adopt petitioner's argument, the Court would either have to hold that "secured" means something different when it refers to the Constitution than when it refers to laws, or that the Constitution does not "secure" any rights and §1983 is therefore unavailable to enforce constitutional rights.

In asking this Court to overrule *Maine v. Thiboutot*, petitioner is asking this Court to overrule a question of statutory interpretation. As this Court has frequently observed, however, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 U.S. at 172-73. *See also Seminole Tribe*, 116 S.Ct. at 1127. Congressional intent is, therefore, key.

Even prior to the *Thiboutot* decision, Congress had unmistakably expressed its view that §1983 provided a broad right to enforce federal statutes. During the passage of 42 U.S.C. §1988, Congress repeatedly noted its approval of the view that §1983 provided for a private right of action to enforce statutes as well as constitutional rights. For example, the Senate report indicated that the bill would result in the award of fees for "redressing violations of the Federal Constitution *or laws* by officials . . ." S.Rep.No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* 5 U.S. Code Cong. and Admin. News 5908, 5911 (1976)(emphasis added). Sponsors of the bill agreed. "Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based on Federal *statutory as well as* constitutional rights." 122 Cong.Rec. 35122 (1976)(Rep. Drinan)(emphasis added). "This legislation is intended to cover cases based on both constitutional *and statutory* rights . . ." 122 Cong.Rec. 33315 (1976)(Sen. Abourezk)(emphasis added); 122 Cong. Rec. 33314 (1976)(Sen. Kennedy). And, during the debate over §1983, congressional supporters approvingly cited cases based on non-equal rights statutes, such as the Social Security Act, as well as statutes providing for equal or civil rights. *Id.*; *Thiboutot*, 448 U.S. at 9-10; Note, "The Application of Section 1983 to the Violation of Federal Statutory Rights: *Maine v. Thiboutot*," 30 De Paul L.Rev. 651 (1981).

Since *Thiboutot*, Congress has reaffirmed its intent that §1983 be interpreted to permit a private right of action to enforce federal statutes in several ways. First, Congress rejected bills introduced in 1981, 1985, and 1987, that would have limited §1983 precisely as urged by petitioner.[13] Indeed, in *Thiboutot*, this Court invited Congress to change the law if it thought the Court's interpretation of congressional intent in error. 448 U.S. at 8. Congress' express refusal to do so is surely some indication of Congress' agreement with the interpretation in *Thiboutot*.

Second, in 42 U.S.C. §1320a-2, passed in response to the decision in *Suter v. Artist M.*, 503 U.S. 347, Congress indicated its view that a private right of action did and should exist in Social Security Act cases. In that statute, Congress sought to reestablish private right of action law as it existed prior to *Suter*, law that included the holding in *Thiboutot*. Whatever the precise meaning of the post-*Suter* statute,[14] it represents a clear re-endorsement of *Thiboutot*. Thus, far from viewing *Thiboutot* as error, Congress has indicated agreement with its holding.

Another principal factor relevant to *stare decisis* is whether the decision has proved unworkable or, in the alternative, has been relied upon.[15] Not only has *Thiboutot* not

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[13] S.584, 97th Cong., 1st Sess §1 (1981); S.436, 99th Cong. 1st Sess. §1 (1985); S.325, 100th Cong., 1st Sess. §1 (1987). *See also Runyon v. McCrary*, 427 U.S. 160, 174-75 (1976).

[14] At the very least, §1320a-2 was clearly intended to reverse any implication in *Suter* that the only right created by the Social Security Act was the right to a state plan, and that persons affected could never sue to require that the plan be implemented.

[15] Petitioner's argument that no one has relied upon the Court's decision in *Thiboutot* is also flawed. There have been hundreds, if not thousands, of decisions both before and after 1980 applying §1983 to create a cause of action for violations of federal statutes.

proven unworkable, but a decision reversing it would cast doubt on dozens of this Court's own cases,[16] and hundreds of lower court cases, a situation that would create massive (and unnecessary) chaos.

In short, petitioner's attack on *Maine v. Thiboutot* would promote instability in the law. The doctrine of *stare decisis* is designed to have precisely the opposite effect.

II. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO REVERSE OR SHARPLY LIMIT THE HOLDING OF *EX PARTE YOUNG*

Because this suit alleges that petitioner is violating federal law in her capacity as Director of the Arizona Department of Economic Security, she is stripped of any Eleventh Amendment immunity under *Ex Parte Young*, 209 U.S. 123, and the federal courts have jurisdiction to provide declaratory and injunctive relief.

Edelman v. Jordan, 415 U.S. 651, is directly on point. *Edelman* was a class action seeking injunctive and declaratory relief against the Director of the Illinois Department of Public Aid for allegedly violating federal mandates that applied to the program of Aid to the Aged, Blind, and Disabled. In other words, like this case, *Edelman* involved a

[16] Following the decision in *Thiboutot*, this Court has repeatedly used its holding to acknowledge that §1983 creates a private right of action to enforce federal law. *Livadas v. Bradshaw*, 114 S.Ct. 2068; *Suter v. Artist M.*, 503 U.S. 347; *Dennis v. Higgins*, 498 U.S. 439; *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498; *Golden State Transit v. Los Angeles*, 493 U.S. 103 (1989); *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Cuyler v. Adams*, 449 U.S. 433 (1981). *See also Schweiker v. Chilicky*, 487 U.S. 412 (1988).

class action suit against the state official responsible for complying with federal standards in a federally funded program. This Court, in an opinion by then-Justice Rehnquist, carefully distinguished between retroactive relief that would run against the state treasury and thus was barred by the Eleventh Amendment, and prospective relief against the state official that had been allowed pursuant to *Ex Parte Young*. The Court declared:

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect. But the relief awarded in *Ex parte Young* was prospective only; the Attorney General was required to conform his future conduct of that office to the requirement of the Fourteenth Amendment.

415 U.S. at 664.

As in *Edelman*, respondents here are seeking only prospective relief to ensure that the Director of the Arizona Department of Economic Security conforms the future conduct of her office to the requirements of federal law. *Edelman* expressly held that suits for such prospective relief are not barred by the Eleventh Amendment, even if compliance with the federal court order would impose costs on the state.

Petitioner offers two reasons why the Eleventh Amendment bars this suit: the injunctive relief would run against the state as the real party in interest, and the case fits within

the exception to *Ex Parte Young* recognized in *Seminole Tribe v. Florida*, 116 S.Ct. 1114. As discussed below, neither of these claims has merit. Indeed, if either were followed, the ability to ensure state compliance with federal law would be greatly diminished, if not eviscerated, thus undermining one of the basic principle of federalism.

A. Injunctive And Declaratory Relief Against State Officers Is Not Barred, Even If The State Government Is The "Real Party In Interest"

Petitioner claims that "the Eleventh Amendment bars a suit against State officers when the 'state is the real, substantial party in interest' and the officer is being sued merely as a representative of the State." Pet.Br. at 25. Petitioner cites *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 463-64 (1945), as authority for this proposition. *Ford Motor Co.*, however, involved a claim for money damages, not injunctive or declaratory relief. *Ford Motor Co.* was a federal court suit brought by a taxpayer for a refund of state taxes that had been paid under protest. *Ford Motor Co.* held only that suits for retroactive money damages against state officers are barred when the state is the real party in interest and the state treasury will be paying the sum. The Court said: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464. The case did not involve a claim for prospective injunctive or declaratory relief.

In fact, no Supreme Court case ever has held that injunctive or declaratory relief against state officers is barred because the state is the real party in interest. Quite the contrary, this Court frequently has recognized that suits against

officers are allowed precisely so that there is a mechanism to ensure state compliance with federal law. In *Perez v. Ledesma*, 401 U.S. 82 (1971), this Court explained:

> *Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution . . . . [The enactment of §1983 and §1331, creating general federal question jurisdiction], together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference. That framework has been strengthened and expanded by subsequent acts of Congress and subsequent decisions of this Court.

Id. at 106-07 (Brennan, J., concurring in part and dissenting in part).

Suits pursuant to *Ex Parte Young* clearly are not barred, as petitioner contends, because the injunctive or declaratory relief is ultimately directed against the state government. In *Ex Parte Young* itself, the suit was brought against the Attorney General of Minnesota to enjoin the enforcement of an allegedly unconstitutional state law. The State, of course, was the "real party in interest." This Court has expressly recognized that reality, but nonetheless concluded that such prospective relief is essential to ensure the supremacy of federal law. For example, in *Pennhurst II*, this Court said that "the injunction in *Young* was justified, *notwithstanding the obvious impact on the State itself* . . . ." 465 U.S. at 104 (emphasis added). As the Court observed, "the *Young* doctrine has been accepted as necessary to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States,'" *id.* at 105, quoting *Ex Parte Young*, 209 U.S. at 160.

Indeed, every time a state officer is sued pursuant to *Ex Parte Young* to enjoin the enforcement of an unconstitutional state law or regulation, the state is the real party in interest. Petitioner's position would bar all such suits and thus effectively overrule *Ex Parte Young*. There would be no way to bring suit in federal court to ensure state compliance with federal law and to uphold the supremacy of the federal government over the states. The state itself, of course, could not be sued in federal court because of the Eleventh Amendment. Petitioner's position also would bar suits against the officers. The doors of the federal courts would be closed, except for the relatively remote chance of Supreme Court review of a state court decision.

This Court often has rejected exactly that possibility and has emphasized the importance of federal courts being available to hear suits against state officers to ensure compliance with federal law. The Court has said that "the doctrine of *Ex Parte Young* seems indispensable to the establishment of constitutional government and the rule of law." *Perez v. Ledesma*, 401 U.S. at 110 (Brennan, J., concurring in part and dissenting in part), quoting C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 186 (2d ed. 1970). Likewise, Justice Souter recently explained: "*Young* provided, as it does today, a sensible way to reconcile the Court's expansive view of immunity expressed in *Hans* with the principles embodied in the Supremacy Clause and Article III .... [T]he rule we speak of under the name of *Young* is so far inherent in the jurisdictional limitation imposed by sovereign immunity as to have been recognized since the Middle Ages." *Seminole Tribe v. Florida*, 116 S.Ct. at 1178-79 (Souter, J., dissenting).

Justice Souter explained the crucial significance of suits pursuant to *Ex Parte Young* in upholding the supremacy of federal law when he stated:

> The decision in *Ex parte Young*, and the historic doctrine it embodies, thus plays a foundational role in American constitutionalism, and while the doctrine is sometimes called a "fiction," the long history of its felt necessity shows it to be something much more estimable .... A rule of such lineage, engendered by such necessity, should not be easily displaced, if indeed it is displaceable at all, for it marks the frontier of the enforceability of federal law against sometimes competing state policies.

Seminole Tribe, 116 S.Ct. at 1180.

Petitioner's position would completely displace *Ex Parte Young*. No mechanism would exist for federal courts to review state laws, no matter how egregious they are in violating federal law and even the Constitution. By petitioner's theory, all federal court review of the constitutionality of state laws, even when accomplished pursuant to *Ex Parte Young*, is barred because the state is the real party in interest. Petitioner simply fails to recognize that ensuring the supremacy of federal law is an essential aspect of federalism and that gutting *Ex Parte Young* in the manner that petitioner advocates would undermine a cornerstone of American government.[17]

B. *Seminole Tribe v. Florida* Creates A Narrow Exception To *Ex Parte Young*

Petitioner offers an alternative argument as to why this case is barred by the Eleventh Amendment: "[t]he principles in *Seminole Tribe* bar a §1983 action in this case." Pet.

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[17] Of course, *stare decisis* strongly supports continued adherence to *Young*, as well as *Thiboutot*. *See Planned Parenthood v. Casey*, 505 U.S. 833.

Br. at 26. In *Seminole Tribe*, this Court declared that "[w]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a Court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." 116 S.Ct. at 1132.

At the outset, it should be noted that *Seminole Tribe* is clearly distinguishable from this case. *Seminole Tribe* did not involve, as does this action, a suit brought pursuant to §1983. Rather, the suit in *Seminole Tribe* was brought under the Indian Gaming Regulatory Act, which expressly allowed suits against states to be brought in federal court. This, of course, was the provision declared unconstitutional in the first part of the majority's opinion in *Seminole Tribe*. Thus, *Seminole Tribe* did not present the situation posed in this case: a suit under the express language of §1983 authorizing suits against state officers to halt violations of "laws" of the United States. Indeed, this is evidenced by the fact that the Court nowhere mentions §1983 or its availability to enforce federal statutes, but instead cites *Schweiker v. Chilicky*, 487 U.S. 412, which concerns suits brought directly under the Constitution.

Even prior to *Seminole Tribe*, this Court had recognized that §1983 suits to enforce a federal statute are precluded when there are "comprehensive enforcement mechanisms" in the law demonstrating "congressional intent to preclude the remedy of suits under §1983." *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. at 20. A fair reading of *Seminole Tribe*, therefore, is that the limitation on §1983 suits announced in *Middlesex County* now also applies to suits against state officers brought pursuant to other federal statutes.

Not surprisingly, this is exactly how lower federal courts have interpreted the exception to *Ex Parte Young*

discussed in *Seminole Tribe*. The Seventh Circuit, for example, cited *Seminole Tribe* and *Middlesex County* as establishing the same proposition, that "[w]hen Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies and that such limitations as they embody are not to be generally circumvented by extending a more generally worded statute over the subject of the more specific one." *McDonnell v. Cisneros*, 84 F.3d 256, 261 (7th Cir. 1996)

This interpretation of *Seminole Tribe* is consistent, as well, with other efforts by this Court to reconcile the Eleventh Amendment and §1983. For example, in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the Court held that state governments are not persons and may not sued under §1983 in state courts. Although the Eleventh Amendment has no application in state court litigation, the Court interpreted §1983 to be in accord with the principles of the Eleventh Amendment.

Similarly, the holding of *Seminole Tribe* that *Ex Parte Young* does not permit suits against state officers under a federal law that embodies a comprehensive enforcement mechanism, is best understood as an effort to bring Eleventh Amendment law into line with the §1983 rule announced in *Middlesex County*. That holding, however, does not doom this suit. To the contrary, it is perfectly clear under *Middlesex County* that the suit against petitioner would be permissible. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, this Court held that a comprehensive enforcement mechanism should be deemed to exist only if there is an "express provision or other specific evidence from the statute itself that Congress intended to foreclose" litigation. *Id.* at 423. *Wright* further ruled that administrative remedies alone do not preclude §1983 litigation absent a more specific congressional intent to prohibit §1983 suits. Here, the only mechanisms to enforce Title

IV-D are administrative and there is no specific congressional intent to bar §1983 litigation.

Thus, *Seminole Tribe* did no more than to extend the *Middlesex County* exception from §1983 suits to suits against state officers brought under other statutory provisions. In other words, when state officers are sued pursuant to *Ex Parte Young*, the *Middlesex County* exception means that such suits are barred if there is a comprehensive enforcement mechanism as defined in *Middlesex County* and *Wright v. Roanoke Redevelopment and Housing Authority*. Because there is no comprehensive scheme in this case, *Ex Parte Young* remains the only avenue available to respondents to secure compliance with federal law. Nothing in *Seminole Tribe* supports petitioner's claim that this sole avenue should now be closed. The Court should emphatically reject petitioner's invitation to turn civil rights enforcement back one hundred years.

CONCLUSION

For the reasons stated above, the Court should affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

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Dated: October 17, 1996